

Romancing the State

Surabhi Ranganathan

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Perhaps the first and very pleasant thought that will strike readers of *Irresolvable Norm Conflicts in International Law* is that the medium is not the message. The book is about the impossibility of reconciling norms that pull in different directions. The writing, however, achieves the feat – not impossible, but very difficult – of balancing erudition with intuition, and complexity with concision. Over the slender course of 153 elegantly drafted pages (including helpful tables and diagrams), Valentin Jeutner unpacks the notion of ‘legal dilemmas’ that states might confront.

A legal dilemma arises when a state finds itself bound by legal norms that are unavoidably in conflict, such that ‘obeying or applying’ one ‘necessarily entails the undue impairment of the other’ (Jeutner 20, 37). The norms in conflict might be obligations undertaken by that state. Or, they may include a right of the state that is at odds with an obligation. The test for a legal dilemma, as well as the challenge, is that the conflict in question cannot be resolved by recourse to harmonious interpretation, or the application of conflict rules – at least, not in a way that preserves the integrity of both norms. In such circumstances, Jeutner argues, a court should not try to impose a false ‘solution’. Rather, legal dilemmas should be addressed in three steps: first, explicit judicial recognition of the existence of a legal dilemma; second, the state’s exercise of its right of election between the competing norms; and third, the court’s enforcement of ‘any prescriptive norm [(obligation)] with which a sovereign elected not to comply’ (Jeutner 92). Such enforcement might take the form of a finding of responsibility on the part of that state. But it should also be open to other states injured by that state’s non-compliance to temper law with ‘mercy’ in recognition of the ‘dilemmatic circumstances’ in which that state made its election between norms (Jeutner 116).

Altogether, *Irresolvable Norm Conflicts* is a sophisticated exposition as well as justification of what has been called ‘*das Prinzip der politischen Entscheidung*’ or ‘the principle of political decision’ in international law. Introduced by [Manfred Zuleeg](#), and discussed thereafter by [Jan Klabbers](#), and by myself in a [book](#) and an [essay](#), the principle recognises that in some circumstances there is no choice other than *choice*: that is, the legal system must simply leave it to a state to decide, as between conflicting norms, which one it will follow. In the context of treaty conflict, the principle finds implicit recognition in Articles 30(4) and 30(5) of the Vienna Convention on the Law of Treaties (VCLT), with Article 30(5) noting that responsibility ‘may arise for a State from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another State under another treaty.’

Despite the gentle reminder that responsibility follows breach, even if the breach is in pursuance of a competing legal norm, the principle of political decision is not much trumpeted in the literature. Perhaps it carries too strong a whiff of concession to state sovereignty; some might wonder why the *fact* of political decision should be elevated

to the level of a *principle*. In 1958, Gerald Fitzmaurice, the third special rapporteur on the law of treaties underlined this distinction, describing a state's choosing between norms [not as a 'right of election' but as a 'power of election'](#) that it could not be prevented from exercising. Yet neither Fitzmaurice, nor his successor in the 1960s, Humphrey Waldock, felt able to exclude the possibility of election; and to Waldock at least, the provision for state election joined to the confirmation that responsibility would follow breach of any treaty obligation represented the only possible principled position [in the 'current state' of international organization](#).

In my work on treaty conflict, I had focused in part on the legal thought of these drafters of the VCLT, explaining their gradual embrace of the principle of political decision as reflecting both philosophy *and* anxiety: a contingent decision in favour of a conflict rule that they thought would best further their common enterprise to strengthen the rule – and role – of law in international affairs, informed by shared liberal and constructivist assumptions about how states related and could relate to international law. As distinct from my approach, which studied legal thought and the practice of a few hard cases of treaty conflict, Jeutner's is theoretical and normative. It offers a justification for the principle of political decision not in terms of the calculations of its drafters, but rather the appropriate roles of states and international courts when facing a hard case of treaty conflict. In my reading the principle of political decision was what the VCLT drafters thought the legal system *could* provide, and possibly would suffice, Jeutner takes a stronger position: the principle is also what the legal system *should* provide.

In his argument, the outcomes of this principle, happy or not, would be more appropriately reached than by ceding extraordinary powers to courts to 'solve' irresolvable norm conflicts. He then further suggests, or so it seems, that the outcomes would also likely be happier ones. States being more grounded decision-makers than remote courts, more accountable, better connected to the multiple communities and interests wrapped up in the genuine legal dilemma of a hard norm conflict, and experiencing, when faced with a legal dilemma 'an "inner anxiety" that triggers a most intense, conscious, and reflective decision-making process' (Jeutner 114). Here, Jeutner, whose wide-ranging influences include moral philosophy, and perhaps psychology, adds further heft and detail to Jan Klabbers's suggestion that the principle of political decision might open the way to responsive politics (Klabbers 90). His three-step model is then a policy approach intended to maximise the prospects of responsive – and responsible – politics by states.

This is a fascinating set of arguments, and beautifully and richly written. I offer below then some observations by way of further teasing out the layers and nuances to Jeutner's approach. That I do so by discussing his work with reference to mine, is not out of a misplaced vanity, but simply because there is a great deal of common ground between us: we take the same approach to conflicts, regarding conflicts between rights and obligations to be as 'true' as conflicts between obligations. We also place intractable conflicts at the heart of our studies; our work 'begins where studies trying to identify norm conflict solutions and avoidance strategies end' (Jeutner 38). Albeit in different ways, we explore dimensions of the principle of political decision. Given the common ground, it is not surprising that my reading of

Irresolvable Norm Conflicts is refracted through the lens of my own work, with the following points drawing upon the intersections and divergences between our works.

The first relates to the key divergence between our approaches. My focus was on the strategic aspect of treaty conflict, and ‘instances where states intentionally manipulate the legal system’; using irresolvable norm conflicts to push desired changes in multilateral legal regimes (Jeutner 6). For Jeutner, however, the irresolvable norm conflicts of significance are those which present not opportunity but tragedy – confronting states with ‘impossible expectations’ of doing justice to norms that pull in different directions (ibid.). Indeed, although choosing ‘irresolvable norm conflicts’ for the title of his book, Jeutner notes that he favours in fact the key phrase of his subtitle – the more morally and indeed emotionally weighted concept of ‘dilemma’. Looming large over the book are scenarios where states have to make existential choices: their own survival versus causing untold suffering to others (one catalyst for this book was the [Nuclear Weapons advisory opinion](#)); making hard choices between friends and enemies (Egypt’s treaties with Israel and the Arab League); or – transposing the condition of the state with that of the individual – where a ship’s captain must choose between two drowning groups. Although not part of his legal definition, Jeutner is evidently less exercised by irresolvable conflicts that lack an affective charge. That being the case, I was curious about his efforts to distinguish moral dilemmas from legal ones, and to disavow the influence of consequentialist arguments upon his reasoning. For, in fact, are not those the very factors that underpin his strong sense that judicial actors should not try to deny or minimise the existence of a dilemma, let alone solve it by way of creative reasoning? (Even where they could without stretching their role, as in case of a conflict between a right and an obligation).

Moral and consequential factors also drive his view of the state. Where I had presented states as strategic actors, the reason for VCLT drafters’ anxieties about the fragility of international law; for Jeutner states are fundamentally moral actors. Their contradictory stances on the international plane are extrusions of the difficult policy choices that face them internally. States must after all think about guns *and* butter, keep up relations with neighbours A and B, and represent domestic constituencies as well as fostering international community. Is it surprising that the contradictions that define their domestic operations manifest as legal dilemmas vis-à-vis their international rights and obligations? Jeutner, in effect, flips our reading of irresolvable norm conflicts: these reflect not so much states playing with or failing international law, but international law offering inadequate responses to the constraints faced by states.

My second point is also about the assumptions about state behaviour and international law that Jeutner’s argument reveals. As mentioned above, my work had suggested that underlying the principle of political decision, and indeed other responses to treaty conflicts, were liberal and constructivist assumptions about international law. These were common to a range of ‘mainstream’ legal scholars despite differences in their approaches, boiling down to a sense that appropriately formulated rules or process could nudge states towards a legal discourse of justification, exemption and reparation, which would lead to better outcomes, and

perhaps strengthen states' respect for international law. Given Jeutner's proposal of a dilemma-addressing process that entails judicial determination in step one and judicial enforcement in step three, and his suggestion that these book-ends will trigger more intense, conscious and reflective decision-making by states in the intervening step, would he agree that he too must be included in the category of those sharing liberal and constructivist assumptions? Indeed, in his case, given the benign view of states, the assumptions are perhaps held even more strongly.

My final point is then about the suitability of these assumptions for all contexts. To the extent that Jeutner's justification turns not on the inevitability of political decision but its appropriateness, it rests upon the presumption of a genuine contestation of values, interests or ideas: an even choice rather than a weighted one. In such circumstances, one might see how Jeutner's three step process might generate better – or at least better-justified – decision making (notwithstanding the unlikelihood of many dilemmas coming before courts). But do all dilemmas present themselves in such balanced terms? Here, I leave aside the obvious point about inequality *between* states that govern choices about which obligations are followed and which are not. Rather, let us consider the situations that constitute the hard cases of today: *Not* choices within a common context (as in Jeutner's distress at sea scenario, or military alliance scenario, or indeed nuclear weapons scenario), but barely-regarded contradictions between slow-burning ecological realities and the concrete political economies in which states are invested. The poignant legal dilemmas of the present arise between hard-won, fragile environmental norms and entrenched economic ones. Such dilemmas tend to be disavowed as soon as identified, for example by resort to the language of 'sustainable development'. But even where they remain recognised as legal dilemmas, compare how they play out in the context of the principle of political decision, and in the long term. In the former context, effectively, after the fact of a dilemma is pronounced (a helpful move considering the resort to denial), states are given a choice between (a) specific, directed and calculable benefits from extractive activities long-framed as reflecting human virtues (endeavour, ingenuity, etc.) and (b) general, unfocused and prospective, if inexorable, harms. What will they choose? What *can* they choose? Any doubts on this point may be clarified by reviewing current practices. Take for example oceans, where attempts to further capture marine resources such as deep seabed minerals are challenged by concerns about eroding ecosystems. While states do note the environmental threats and are sophisticated engagers of environmental concepts and discourses, these remain subordinated to the goal of exploiting resources for commercial gain; that goal is regarded as an inevitability, not a choice. (I hope I do not need to press the ironic reversal of inevitabilities that will follow in the long term.)

I wonder if it is helpful to unpack this type of dilemma too in terms of 'tragic choice' or 'impossible expectations' facing states, calling forth normative justifications for the principle of political decision? I recognise the inevitability of that principle's practical operation, although this is rarely in the sophisticated judicially-guided way that Jeutner proposes. But how we choose to describe situations matters, and I must confess to feeling some discomfort with the romantic cast given to that principle, and to the state as its moral agent, in principal message conveyed by *Irresolvable*

Norm Conflicts. That being the case, I have unreserved enthusiasm for the book's secondary message, which is to make more of the analytical opportunity offered by legal dilemmas to challenge how we frame problems and solutions, and what that framing tells us about the political economy of international law. I think Jeutner's major achievement is in conveying that critical message alongside his normative one.

[Surabhi Ranganathan](#) is a University Lecturer in International Law, a Fellow of the Lauterpacht Centre for International Law, and a Fellow and Director of Studies in Law (Parts IA & II) at King's College, University of Cambridge. She is also a fellow of the Cambridge Centre for Environment, Energy and Natural Resource Governance (C-EENRG).

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